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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211, 212, and 232

RIN 0750-AI13

Defense Federal Acquisition Regulation Supplement: Application of Certain Clauses to Acquisitions of Commercial Items (DFARS Case 2013-D035)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the applicability of two clauses to acquisitions of commercial items.

DATES: Comment Date: Comments on the proposed rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the **FEDERAL REGISTER**], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D035, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS

Case 2013-D035" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D035." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D035" on your attached document.

- o E-mail: dfars@mail.mil. Include DFARS Case 2013-D035 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Susan C. Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Susan C. Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6092; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise DFARS part 212, Acquisition of Commercial Items, to clarify the applicability of DFARS 252.211-7008, Use of Government-Assigned Serial Numbers, and DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions, to acquisitions of commercial items by adding them to the list at 212.301(f) and revising the clause prescriptions to require their inclusion in solicitations and contracts for acquisitions of commercial items using FAR part 12 procedures.

DFARS 252.211-7008 is not listed for use in commercial acquisitions at 212.301(f); nor does the clause prescription at 211.274-6(c) address applicability to commercial item acquisitions. DFARS 252.211-7008 is prescribed for use in solicitations and contracts that include the clause at DFARS 252.211-7003, Item Identification and Valuation, and that also require the contractor to mark major end items (211.274-6(c)). DFARS 252.211-7003 is required to be included in solicitations and contracts for commercial items (see DFARS 212.301(f) and 211.274-6(a)(1)).

DFARS 252.232-7006 is prescribed for use when DFARS 252.232-7003 is used, unless the circumstances of 232.7003(b) or (c) apply (232.7004(b)). DFARS 252.232-7003 is required to be included in solicitations and contracts for commercial items except under limited circumstances provided in 232.7002(a) (see DFARS 212.301(f) and 232.7004(a)).

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule merely provides explicit clarification of the applicability of DFARS 252.211-7008, Use of Government-Assigned Serial Numbers, and DFARS 252.232-7006, Wide Area Workflow Payment Instructions, to acquisitions of commercial items. Nevertheless, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DFARS part 212, Acquisition of Commercial Items, is being revised to clarify the applicability of DFARS 252.211-7008, Use of Government-Assigned Serial Numbers, and DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions, to acquisitions of commercial items by adding them to the list at 212.301(f) and revising the clause prescriptions to specifically include them in solicitations and contracts for acquisitions using FAR part 12 procedures.

According to the Federal Procurement Data System, in Fiscal Year 2012, DoD made approximately 95,000 contract awards (not including modifications and orders) that exceeded the micro-purchase threshold, using FAR part 12 procedures, of which approximately 60,000 (63%) were awarded to about 35,000 unique small business entities. This rule is likely to have a slightly positive impact because the additional clarity will help contracting officers and small businesses to better understand DoD's requirements. This rule does not add any information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. Also, no alternatives were identified that will accomplish the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D35), in correspondence.

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 211, 212, and 232

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 211, 212, and 232 are proposed to be amended as follows:

1. The authority citation for parts 211, 212, and 232 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211-DESBIBING AGENCY NEEDS

2. In section 211.274-6, paragraph (c) introductory text is revised to read as follows:

211.274-6 Contract clauses.

* * * * *

(c) Use the clause at 252.211-7008, Use of Government-
Assigned Serial Numbers, in solicitations and contracts,
including solicitations and contracts using FAR part 12
procedures for the acquisition of commercial items, that-

* * * * *

PART 212-ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 212.301 by-

a. Redesignating-

i. Paragraphs (f)(1) through (lxviii) as (f)(lii) through
(lxx);

ii. Paragraphs (f)(xii) through (xl ix) as (f)(xiii) through
(1).

b. Adding new paragraphs (f)(xii) and (li).

The additions read as follows:

**212.301 Solicitation provisions and contract clauses for the
acquisition of commercial items.**

(f) * * *

(xii) Use the clause at 252.211-7008, Use of Government-
Assigned Serial Numbers, as prescribed in 211.274-6(c).

* * * * *

(li) Use the clause at 252.232-7006, Wide Area WorkFlow
Payment Instructions, as prescribed in 232.7004(b).

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PART 232-CONTRACT FINANCING

4. In section 232.7004, revise the section heading and paragraph (b) to read as follows:

232.7004 Contract clauses.

* * * * *

(b) Use the clause at 252.232-7006, Wide Area WorkFlow Payment Instructions, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when 252.232-7003 is used and neither 232.7003(b) nor (c) apply. See PGI 232.7004 for instructions on completing the clause.

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